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NO BRANCH ASYLUM

Judge Hewitt's Injunction Is Sustained

BY THE SUPREME COURT.

A Branch Cannot Be Located Away from Salem.

The supreme court has handed down a final decision in the case of the State of Oregon, ex rel, James McCain, respondent, vs. Phil. Metschan, appellant involving the payment of the $25,000 warrant for the lands purchased in Union county on behalf of the Eastern Oregon branch insane asylum. The appeal went up from Marion county on March 30, 1896, and after months of deliberate and devoted review a decision was handed down yesterday affirming the judgment rendered by Hon. H. H. Hewitt, judge of the circuit court for Marion county, department No. 2.

The full text of the court's findings is as follows:

"Bean, J: This is a suit commenced by the district attorney of the third judicial district, in the name and on behalf of the state, to enjoin the state treasurer from paying a $25,000 state warrant issued on account of the purchase of certain land in Union county for the site of an insane asylum under an act of the legislature of 1893 (Laws 1893, p. 136) on the ground that the act in question is void because in contravention of the provision of the constitution locating such institutions at the seat of government. A demurrer to the information for the reason that it does not state facts sufficient to constitute a cause of suit, and "that there is a defect of parties plaintiff and defendant,' was overruled and defendant declining to plead further, a decree was entered as prayed for in the information and hence this appeal. In support of the demurrer it is contended that there is a defect of parties defendant because the owner of the warrant, the payment of which is sought to be enjoined, is not a party to the suit. If this is the rule and the objection had been properly taken it would have been fatal. The rule, undoubtedly, is that the owner of a state or county warrant is a necessary party to the suit to enjoin the payment and, in some instances, the courts deeming him an indispensible party, refuse to proceed to a final determination of suit until he is brought in, although the parties to the record make no objection on that account or even consent to proceed without him: City of Anthony vs. State ex rel., 49 Kan. 246; Buie & Cunningham, 29 S. W. 801; King vs. Commissioners' Court, 30 S. W. 257; State of Kansas vs. Anderson, 5 Kan. 90; Graham vs. City of Minneapolis, 40 Minn. 346, Ship Channel Co. vs. Bruly, 45 Tex. 6; Board vs. T. P. & R. W. C., 46 Tex. 316. But in this case, while it is not apparent from the face of the information to whom the warrant was issued or by whom it is owned at the time the suit was brought, the undertaking and order for a preliminary injunction and the decree appealed from, all state that it was issued to the prrsent defendant so that the court would hardly be justified in holding that it affirmatively appears there is a defect of parties. But, however this may be, the demurrer itself is insufficient both in form and substance to raise the question. The statute provides that objections apparent upon the face of the complaint other than such as go to the jurisdiction of the court and that it does not state sufficient to constitution to constitute a cause of action or suit, are waived unless taken by demurrer (Sec. 71 Hill's Ann. Laws Or.,) and that a demurrer shall be disregarded unless it distinctly specifies the grounds of objection: Sec. 68. At common law, a demurrer for want necessary parties defendant was required to point out either by name or in some other definite way from the facts stated in the bill those who should have been and who were not made parties to the suit so as to enable the plaintiff to obviate the objection by bringing them in (Strong's Eq. Pl. 543; Dias vs. Bonchaud, 10, page 455;) and this rule has not been abrogated by the provisions of the code: 1 Rumsey's Pr., 383; 1 Stanmood's Pl., 75; Durham vs. Bischof et al., 47 Ind. 211; Dewey et al. vs. The State ex rel., 91 Ind. 173; Baker vs. Hawkins 29 Wis. 479; Kent. vs Snyder, 30 Cal. 666; Irwine et al. vs. Wood et al., 7 Colo. 477.

Now the language in the demurrer in this case is 'that there is a defect of parties plaintiff and defendant,' and this, as we have seen, is insufficient so that the question is not raised by the demurrer nor can the case be classed with those in which the courts have refused to proceed to the determination of a suit to enjoin the payment of a state or county warrant without the owner or holder thereof being a party to the suit. As already suggested, the record indicates that the warrant in question was issued to the defendant, and if so there is no defect of parties: Bowman vs. Hetzger, 27 Or. 23; but whether it was or not the questions involved do not depend upon contraverted facts for their solution, but are questions of laws which have been ably and exhaustively argued and can be determined on this appeal without affecting the interests of the warrant-holder, should he prove to be other than the defendant, except so far as the doctrine of 'stare decisis' may apply to any future proceeding which may be instituted by him to enforce its payment. The demurrer, for want of proper parties, was, therefore, properly overruled, and if by reason of the facts, the warrant-holder should have been made a party to the suit either on his own account or as a protection to the defendant it should have been made apparent by answer and, if necessary, the court could have stayed the proceedings until he could be brought in.

"It is next contended that the information does not state facts sufficient to authorize a court of equity to interfere by injunction to restrain the payment of the warrant in question for the reason that it does not appear that the state would be pecuniarly injured or damaged by the construction of an insane asylum in Eastern Oregon instead of at the seat of government. The question as to when and by whom a suit can be maintained to prevent the construction of public buildings at a place other than the seat of government has been before this court several times and it has been held that a private individual cannot do so without showing some special injury to himself (Sherman vs Bellows, 24 Or, 553) and that the same rule applies when a suit is instituted in the name of the state upon his relation: State vs Pennoyer, 26 Or 205; State ex rel. vs Lord, 28 Or. 498. But these cases are not in point in the present controversy. The one first referred to was a suit instituted by a private citizen in his individual capacity, without showing special injury to himself, and the other was a proceeding against the board of commissioners of public buildings by a private citizen who undertook to use the name of the state without authority and was decided on the ground that it was not brought by nor against the proper parties. But this is a suit by the state in its sovereign capacity as the guardian of the rights of the people, instituted by its own executive law officer and can, in our opinion, be maintained without showing any special injury to the state. It is enough that the public funds are about to be applied in a manner prohibited by the constitution.

"At common law the attorney-general of England could, by information in the name of the crown, call upon the courts of justice to prevent the misappropriation of funds or property raised or held for public use, and in the same absence of statutory regulations the district attorney in this state is vested with like powers. (State vs. Douglas Co. R. Co. 10 Or., 198; Savings Bank vs. United States, 19 Wall 239.) Indeed the right of the state through its proper officers to maintain such a proceeding would seem to be one of the necessary incidents of sovereignty. Without it the rights of the citizen cannot be protected or enforced in cases where he is unable to act for himself. In a suit by an individual he is required to show some special injury to himself, and when, as in this case, the wrong complained of is public in its character, affecting no one citizen more than another, it is impossible for him to do so and for that reason he is without remedy, although he may be injured in common with the other members of the community. In such cases the state has a right, by virtue of its high prerogative power, to call upon the courts through its proper law officer to protect the rights of its people. And to support a proceeding for that purpose it is sufficient that the grievance complained of is a threatened invasion of the right of the people to determine what disposition shall be made of the public funds exacted from them by the extraordinary power of taxation. Now every use of such funds in violation of the provisions of the constitution or organic law must necessarily be of this character. The legislature is but an instrumentality appointed by the state to exercise its sovereign powers. In that capacity it holds the public funds in trust for the people. Except as limited by the constitution, its action within its legitimate sphere is the action of the people, but when it undertakes to apply such funds in a manner or at a place prohibited by the organic law, it is exercising a power expressly withheld but violating its trust and a court of equity will interfere at the dictation of the sovereign power to prevent or restrain such application without being required to show any other injury. It is enough that the threatened disposition is in violation of the will of the people as expressed in the supreme law of the land. There is some dicta in paragraph 7 of the opinion in the case of State vs. Lord, 28, Or. 498, in which the writer thereof did not concur, apparently in conflict with this doctrine, but it was not necessary to a decision of the case, and after more mature reflection we are are now all agreed that it was erroneous. It is based upon the false premises (1) that the location and construction of an asylum at some other place than the seat of government is not a misapplication of the public funds unless it appears that the burden of taxation will be increased by so doing; and (2) that the location of such an institution is a legislative question. Manifestly neither of these positions is sound. The expenditure of public money at a place prohibited by the constitution is a mis-application thereof for the simple and very satisfactory reason that it is against the declared will of the people, and the location of a public institution, within the meaning of that term as used in the constitution, is not in any sense a legislative question but has been determined by the people themselves. A sufficient injury, therefore, to enable the state in its sovereign capacity to call upon a court of equity for relief is shown whenever it is made to appear that public funds are about to be applied to a use, for a purpose or at a place prohibited by the constitution. We conclude, therefore, that the court has jurisdiction and the only remaining question is whether the act of the legislature authorizing the construction of an insane asylum in Eastern Oregon is in violation of the provisions of the constitution.

"By section one, article fourteen, of that instrument it is provided that the legislature shall not have the power to establish a seat of government, but that such questions shall be submitted to and detemined by the people at the polls, and section three, of the same article, declares that when the seat of government is so established it shall 'not be removed for the term of twenty years from the time of such establishment, nor in any other manner than as provided in the first section of this article; provided, that all the public institutions of the state hereafter provided for by the legislative assembly shall be located at the seat of government.

Although the language of the section quoted is somewhat involved, the evident intention of the framers of the constitution and of the people when they adopted it was to declare that all the public institutions of the state thereafter provided for by the legislature should be located at the seat of government. It amounts to and is, in effect, a constitutional location of such institutions and the only power vested in the legislature is to determine the necessity for and the amount of money to be used in their construction and maintenance. Any attempt by that body to expend public revenue for the erection or maintenance of such an institution elsewhere is a mere nullity and of no more force or validity than a legislative attempt to change the seat of government. All such institutions must be located at the place designated in the constitution, although it may now seem desirable to do otherwise, until the consent of the people is obtained in the form of a constitutional amendment. In their sovereign capacity the people have so provided and no other power can alter or change their decree. That an insane asylum is a public institution of the state within the meaning of the constitution is too clear for argument. In view of the practical construction of that instrument by the legislative and executive departments for almost, if not quite, a quarter of a century, as evidenced by the erection of educational institutions away from the seat of government, it no doubt should now be construed as to include only such institutions as are strictly governmental in their character. But an asylum for the insane comes clearly within this construction. When, therefore, the legislature assumed to authorize the expenditure of the public funds for the erection of such an institution in Eastern Oregon it attempted to exercise a power expressly withheld by the people and an injury to the state will be conclusively presumed from a threatened application of the public funds to such a purpose.

"It follows that the decree of the court below must be affirmed and it is so ordered."

THE BRANCH ASYLUM DECISION.

The supreme court has rendered a square decision in the Eastern Oregon Asylum case and upholds the constitution prescribing that state institutions shall be located at the seat of government. As a board, Pennoyer, Metschan and McBride bought the site of the property at Union, Oregon, and its title was vested in the state. The price was $25,000. Even at the time it was bought an injunction was resting against it. The decision leaves the state in possession of land it has not paid for.

THE DECISIONS.

In one case heretofore, Sherman vs Bellows, known as the Soldiers Home case, and in two other cases on the asylum matter, the court held that the action was not properly brought. The court found the question of construing the constitution, not properly before it, and could not render a decision on the merits of the matter.

In the case of Pennoyer and the Board, and Lord and the Board, as defendants, upon the relation of Taylor, the decision was also not on the merits. But when the state brought an action in its sovereign right by the District Attorney in his official capacity, to prevent a perversion of the public funds, the court gained jurisdiction and grants the relief asked.

It is a well known proposition of jurisprudence that a court to take cognizance of a constitutional matter, it must be brought squarely to issue. Under no circumstances does a court go out of its way to interpret the constitution. On the other hand it compels those who raise constitutional questions to show clearly that there is a constitutional question involved.

THE FINANCIAL STATUS.

About $500 has been drawn on the Eastern Oregon asylum appropriation including one attorney fee of $250. All necessary expenses connected with the asylum will have to come out of the appropriation levied for the asylum at Union. All has been converted into the general fund, except the $40,000 levied this year. What was levied in 1894 was turned back into the general fund. The levy for the Eastern Oregon asylum last January was $40,000. This will be used in payment of warrants on the general fund. The warrant of $25,000 that was issued for payment of the land is out, endorsed by the State Treasurer. It was issued in the name of Phil. Metschan as a member of the state board, turned over by him to Thos. Wright, of Union, who in turn passed it over to a Portland bank where it is now. The title to the lands have passed to the State, and are on file with the Secretary of State. The deed is recorded in Union county. The land is paid for, but not by the State, although the State owns the land.

Second crops of strawberries are in bloom in Coos county, and are promising, though they may be nipped.

NOTED BANDIT KILLED

By Texas Rangers While Resisting Arrest.

TEXAS RANCHER IN JAIL.

Other Criminal Matters of Interest to Readers.

Desperado Killed.

DENVER, Nov. 10.—Federal officers received a telegram saying that Mignel Reville was killed near Childers, Tex., Saturday, by a Texas ranger when resisting arrest. Reville was the leader of a gang of outlaws who have infested Southern Colorado for years.

Must Return to Germany.

SAN ANTONIO, Tex., Nov. 10.—About ten years ago a young German named August Kerman arrived in the town of Rock Springs and purchased a ranch of 2800 acres near the town. He claimed to be from New York. He was possessed of an abundance of money. Kerman made few friends during his ten years' residence on the ranch.

A German detective, claiming to represent, the German government, arrested Kerman. The latter submitted quietly, and said that he would return to Germany without extradition. He said he was at one time in the postal service of the German government, that an irregularity occurred in his department and that he fled to this country in order to escape punishment. The detective refused to make any statement of the case.

Accident to Battleship.

NEW YORK, Nov. 10.—The United States battleship Texas, while lying at Cob dock, in the Brooklyn navy-yard had a 13-inch hole stove in her side, caused by breaking her dock, and she now lies on the bottom of the dock with her engine-room full of water. The Chapman Derrick & Wrecking Company were notified, and have sent the wrecking tugs William L. Chapman and Hustler and tugs W. H. Lewis and Astoria to raise the sunken ship.

Serious Riot in India.

BOMBAY, Nov. 10.—Serious rioting occurred at Shotaput. Five thousand men looted 1,500 bags of glain. The police fired upon the mob, killing four men and wounding six. A further outbreak is feared as Shotaput is one of the worse famine tracts.

PLAINTIFF GETS THE HORSE.—Having heard all the testimony in the case of Dora Bennett vs F. T. Wrightman for the recovery of "Black Alder" which had been attached by Marion county's sheriff to satisfy a judgment held by T. C. Shorpe vs W. W. Cardwell, original owner of the horse, Justice H. A. Johnson took the matter under advisement last night until 2 p. m. today. By the decision of Justice Johnson the plaintiff gains possession of the animal.

Eastern apples are now shipped into Oregon, and they are being compared and our own stock is claimed to be the best of the two.